BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DELORES L. ROBLEADO	)	
Claimant	)	
VS.	)	
	)	Docket No. 261,967
SMOOT COMPANY	)	
Respondent	)	
AND	)	
	)	
COLONIAL CASUALTY INSURANCE COMPANY/	)	
WESTERN GUARANTY FUND and	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carriers	)	

ORDER

Claimant appealed the June 28, 2004 Award entered by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on November 9, 2004.

APPEARANCES

Michael W. Downing of Kansas City, Missouri, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and Colonial Casualty Insurance Company/Western Guaranty Fund (Western). And Randall W. Schroer of Kansas City, Missouri, appeared for respondent and Travelers Insurance Company (Travelers).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, at oral argument before the Board, the parties agreed September 9, 2001, was claimant's last day of working for respondent.

ISSUES

This is a claim for repetitive use injuries to both of claimant's arms. In the June 28, 2004 Award, Judge Hursh determined the appropriate date of accident for this claim was September 9, 2001, when claimant was laid off. The Judge also determined claimant sustained a five percent functional impairment to her left arm but that she had failed to

prove she had sustained an injury to her right arm. Because the September 9, 2001 accident date fell within Travelers' coverage period, the Judge ordered respondent and Travelers to pay claimant's permanent partial disability benefits.

Claimant contends Judge Hursh erred. Claimant argues she injured both arms and, therefore, she is entitled to receive benefits for either a permanent total disability under K.S.A. 44-510c or a permanent partial general disability under K.S.A. 44-510e. Although claimant argued in her brief to the Board that it should modify the date of accident, at oral argument to the Board claimant argued the Board should affirm the September 9, 2001 date of accident for these alleged repetitive trauma injuries.

Travelers also contends Judge Hursh erred. Travelers argues claimant injured her left arm only and, therefore, the appropriate date of accident for that injury was July 13, 2000, when claimant's doctor allegedly restricted her use of the left arm. Accordingly, Travelers argues Western should be responsible for claimant's permanent disability benefits for the proposed July 13, 2000 accident date as it fell within Western's coverage period. In the alternative, Travelers argues claimant sustained two separate accidents and, therefore, should be compensated for two injuries under the scheduled injury statute, K.S.A. 44-510d.

Western, on the other hand, argues the June 28, 2004 Award should be affirmed.

The issues before the Board on this appeal are:

1. What is the appropriate date of accident for claimant's injuries?

2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. In 1995, claimant commenced working for respondent as a machinist. The work was hand intensive and in July 2000 claimant began experiencing pain in her left arm. Claimant reported her symptoms to respondent and the company referred her to Dr. Mary Brothers for treatment.

2. On July 13, 2000, claimant first consulted Dr. Brothers. The doctor initially diagnosed a possible ganglion cyst and, consequently, gave claimant a splint for her left arm, sent her to physical therapy, restricted her to light duty work, and restricted her use of the left arm. On October 18, 2000, claimant saw Dr. Anne Rosenthal,

who diagnosed wrist pain and a possible ganglion cyst. Dr. Rosenthal recommended that claimant should wear her left wrist splint as needed at work.

3. Claimant, who is right-handed, continued working for respondent operating her regular machine. But claimant used her right arm more intensively. By December 2000, claimant had begun experiencing symptoms in her right arm. Claimant was given restrictions concerning her right arm and, eventually, in December 2001 underwent surgery by Dr. Rosenthal to remove two ganglion cysts from the left wrist. In March 2002, Dr. Rosenthal released claimant from treatment.

4. Meanwhile, claimant's employment status changed. On September 9, 2001, claimant was laid off. According to claimant, she performed her regular job duties operating an engine lathe from July 2000, when she began experiencing left arm symptoms, through the date of her termination in September 2001. Claimant testified, in part:

> Q. (Mr. Downing) Okay. I want to make sure that the judge understands since the beginning of your problems in July of 2000 through December of 2000, when you started having problems with your right arm, up until you were laid off by the company, did you continue to do your regular job?
>
> A. (Claimant) Yes.
>
> Q. Okay. You have been placed on restrictions by the various doctors, but the employer had you continue performing your regular job.
>
> A. I did my regular job, but then when I needed to take time off from that engine lathe because of my back,[1] I would do other different jobs.[2]

5. As claimant continued to work for respondent after December 2000 her symptoms in both hands and arms grew progressively worse. Claimant directly attributed her worsening symptoms to her job. Claimant testified, in part:

> Q. (Mr. Brewer) Let me ask it this way. Your hands got worse as you were doing your job after December of 2000, and we're talking

[1] Claimant had a previous back injury that required surgery.

[2] R.H. Trans. at 24-25.

> about both hands were getting worse up until you last worked in September of 2001, correct?
>
> A. (Claimant) Yes.
>
> Q. Do you attribute the fact that your hands were getting worse from doing your job at Smoot Company [respondent], as opposed to something away from work?
>
> A. No, they just got worse from working from Smoot Company.
>
> . . . .
>
> Q. And you did have some restrictions at that time, albeit you were still doing the same job. You were just doing it differently because you were mixing with both hands as opposed to just one. You had restrictions on both hands.
>
> A. Yes.[3]

6. The parties presented the testimony of four doctors. Claimant's expert medical witness, Dr. P. Brent Koprivica, examined claimant in July 2001. Dr. Koprivica characterized claimant's upper extremity problems as a cumulative trauma disorder and an overuse syndrome with diffuse chronic tendinitis. The doctor recommended electrodiagnostic studies for determining whether claimant had an entrapment neuropathy. The doctor noted his clinical exam was consistent with carpal tunnel syndrome, although he did not diagnose that condition due to the lack of electrodiagnostic studies. Assuming no further treatment was suggested by the recommended electrodiagnostic studies, the doctor considered claimant at maximum medical improvement. According to Dr. Koprivica, the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*) (4th ed.) does not address the diagnosis of cumulative trauma disorder. But using the *Guides* as a guideline, the doctor rated claimant as having a mild upper extremity impairment, bilaterally, due to her loss of grip strength. Consequently, the doctor rated the impairment to each upper extremity at 10 percent, which combined for a 12 percent functional impairment to the whole body.

7. Moreover, Dr. Koprivica testified claimant should avoid activities requiring repetitive hand tasks, including pinching, grasping, wrist flexion or extension, ulnar deviation of the wrist, forearm supination or pronation, repetitive elbow flexion or extension, and vibration to her upper extremities. The doctor also indicated the 10-pound

[3] *Id.* at 65-66.

lifting restriction claimant had been given for her earlier back injury was also appropriate for her bilateral upper extremity injuries. After reviewing a list prepared by claimant's vocational expert Michael J. Dreiling of the 16 former work tasks that claimant performed in the 15-year period before developing her alleged upper extremity injuries, Dr. Koprivica testified that claimant had lost the ability to perform 13 of the 16 tasks, or approximately 81 percent, strictly due to her bilateral upper extremity injuries.

8. Western presented the testimony of orthopedic surgeon Dr. Anne Rosenthal. As indicated above, claimant first saw Dr. Rosenthal in October 2000 and again in November 2001 after claimant had been laid off. The doctor found claimant had two ganglion cysts on her left wrist, which the doctor attributed to the repetitive work claimant performed for respondent. On December 3, 2001, Dr. Rosenthal surgically removed both cysts. Following surgery, claimant complained of symptoms that suggested ulnar nerve compression in her left elbow. Claimant then underwent nerve conduction studies of the left upper extremity, which produced normal results. The doctor rated claimant as having a one percent functional impairment to the left upper extremity under the AMA *Guides* (4th ed.) and indicated that claimant needed no restrictions for her left upper extremity. Dr. Rosenthal did not treat or examine the right upper extremity.

9. Western hired Dr. Chris D. Fevurly to examine and evaluate claimant. Dr. Fevurly examined claimant in June 2001 and found she had generalized tenderness throughout the musculature in both upper extremities. The doctor, however, testified he found no objective factors upon which to rate an impairment using the AMA *Guides* (4th ed.). Consequently, Dr. Fevurly found no ratable impairment. Instead, the doctor testified claimant had no identifiable injury but merely an intolerance to the repetitive activity required by the work she was performing for respondent.

10. Travelers hired Dr. David J. Clymer to evaluate claimant. The doctor examined claimant in early October 2002. After finding claimant had a slight loss of motion and localized discomfort in the left wrist and weakness in the left hand, Dr. Clymer rated the functional impairment in claimant's left upper extremity at eight percent. But the doctor did not "find evidence of any permanent impairment according to the *Guides to the Evaluation of Permanent Impairment*, American Medical Association, 4th Edition involving the right upper extremity."[4] The doctor, however, noted that claimant complained of chronic discomfort in the right upper extremity and also that she appeared to have some mild weakness in that extremity. Finally, Dr. Clymer

[4] Clymer Depo., Ex. 2 at 8.

recommended that claimant avoid highly repetitive activities with her upper extremities.

11. Claimant's attorney hired vocational expert Michael J. Dreiling to evaluate claimant. Mr. Dreiling identified 16 separate work tasks that claimant performed in the 15-year period before developing her alleged bilateral upper extremity injuries. Considering claimant's previous back injury and her alleged bilateral upper extremity injuries, Mr. Dreiling concluded claimant was realistically unemployable in the open labor market. Mr. Dreiling, however, indicated there were jobs available to claimant in the open labor market paying from $6 to $7 per hour considering only the restrictions for her upper extremities, her education, and experience.

12. At the time of the April 2004 regular hearing, claimant was neither working nor looking for work as she was processing a claim for Social Security disability benefits.

13. The Judge determined claimant's average weekly wage as of September 9, 2001, was $650.53, which included additional compensation items. None of the parties have challenged that finding in this appeal.

CONCLUSIONS OF LAW

The Board concludes it is more probably true than not that claimant sustained repetitive traumas to both upper extremities through September 9, 2001. Accordingly, September 9, 2001, is the appropriate date of accident for this repetitive injury claim. The greater weight of the evidence establishes that claimant continued to perform her regular duties as a machinist through her last day of work, despite the fact that respondent permitted claimant to perform other tasks during the workday when her back symptoms flared. Claimant's testimony also established that the symptoms in both upper extremities progressively worsened as she continued to work until she was laid off.

The medical evidence is divided as to whether claimant sustained a permanent injury to her upper extremities as a result of the work she performed for respondent. The medical evidence, however, establishes that claimant's bilateral upper extremity problems prevent her from performing the job duties that she was performing as a machinist for respondent. As indicated above, Dr. Koprivica determined claimant sustained permanent injury to both upper extremities. At the other extreme, however, Dr. Fevurly concluded claimant had sustained no injury but merely had an intolerance to the repetitive activity required of her job. Dr. Fevurly, however, failed to explain how claimant could perform her regular work activities for over five years before developing an intolerance to that work.

The Board finds claimant's testimony credible regarding her ongoing bilateral upper extremity symptoms. Accordingly, the Board concludes claimant sustained simultaneous injury to both upper extremities. Furthermore, the Board is persuaded by Dr. Koprivica's testimony that claimant has sustained a cumulative trauma disorder and overuse syndrome involving both upper extremities, which constitutes a 12 percent whole body functional impairment.

Because claimant has sustained simultaneous repetitive trauma to both upper extremities, claimant's permanent disability benefits are governed by K.S.A. 44-510e.[5] That statute provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

But that statute must be read in light of *Foulk*[6] and *Copeland*.[7] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability

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[5] *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

[6] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[7] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the worker's employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages being earned when the worker failed to make a good faith effort to find appropriate employment.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[8]

The Kansas Court of Appeals in *Watson*[9] held the worker's failure to make a good faith effort to find appropriate employment did not automatically limit the worker's permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for purposes of the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[10]

At the time of the regular hearing, claimant was not looking for work as she had applied for Social Security disability benefits. The Board is aware of claimant's prior back injury and, therefore, is aware that claimant is limited in the jobs that she can perform due to both her permanent back injury and her bilateral upper extremity injuries. Accordingly, claimant must be selective in the work she performs. The Board, however, is not persuaded that claimant is permanently and totally disabled from working. And the Board specifically finds that claimant's bilateral upper extremity injuries do not render her permanently and totally disabled. Consequently, the Board concludes claimant has not made a good faith effort to find appropriate employment and, therefore, a post-injury wage should be imputed for purposes of the permanent partial general disability formula.

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[8] *Id.* at 320.

[9] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[10] *Id.* at Syl. ¶ 4.

Mr. Dreiling testified that claimant retained the ability to earn between $6 and $7 per hour despite her bilateral upper extremity injuries. The Board finds that testimony credible and, therefore, concludes claimant retains the ability to earn approximately $260 per week. Comparing claimant's pre-injury average weekly wage of $650.53 to a post-injury average weekly wage of $260 yields a 60 percent wage loss.

The Board adopts Dr. Koprivica's task loss opinion that claimant should no longer perform 13 of 16, or approximately 81 percent, of her former work tasks due to her bilateral upper extremity injuries. Averaging the 81 percent task loss with the 60 percent wage loss yields a 71 percent permanent partial general disability. Consequently, the June 28, 2004 Award should be modified.

AWARD

WHEREFORE, the Board modifies the June 28, 2004 Award, as follows:

Delores L. Robleado is granted compensation from Smoot Company and Travelers Insurance Company for a September 9, 2001 accident and resulting disability. Based upon an average weekly wage of $650.53, Ms. Robleado is entitled to receive 239.81 weeks of permanent partial general disability benefits at $417 per week for a total not to exceed $100,000.

As of November 15, 2004, Ms. Robleado is entitled to receive 166.14 weeks of permanent partial general disability compensation at $417 per week in the sum of $69,280.38, for a total due and owing of $69,280.38, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $30,719.62 shall be paid at $417 per week until paid or until further order of the Director.

Respondent and Colonial Casualty Insurance Company/Western Guaranty Fund (Western) are ordered to pay the medical expense that was incurred by claimant for treatment of these injuries during Western's period of coverage. And respondent and Travelers Insurance Company (Travelers) are ordered to pay the medical expense that was incurred by claimant for treatment of these injuries commencing with Travelers' period of coverage.

Future medical benefits shall be considered upon proper application to the Director should the parties be unable to agree.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and Western
Randall W. Schroer, Attorney for Respondent and Travelers
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director